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No. 90-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SEKOU EALY, infant, by ROBERT EALY and SANDRA EALY, guardians,
Petitioners,

v.

RICHARDSON-MERRELL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24

QUESTION PRESENTED

Should a writ of certiorari be granted to review the decision of the United States Court of Appeals for the District of Columbia Circuit (1) applying traditional judgment n.o.v. standards to the record of this case and (2) concluding, as have other courts, that the record evidence did not support a reasonable juror finding that Bendectin caused petitioner's birth defects?

CORPORATE AFFILIATIONS OF RESPONDENT

Respondent Merrell Dow Pharmaceuticals Inc., sued herein under its predecessor name Richardson-Merrell Inc. ("Merrell"), is a wholly owned subsidiary of Marion Merrell Dow Inc., which is approximately ⅔ owned by The Dow Chemical Company. Their subsidiaries and affiliates that have securities in the hands of the public are the following:

Arabian Chemical Company Limited; Compagnie des Services Dowell Schlumberger; DCU/LB TRUST; Alamo Land Company Inc.; Dexco Polymers; Donichem Chemical KFT; Transformadora de Etileno S.A.; Chimtrade; Vorakim Kimya Sanayi Ve Ticaret A.S.; Dowell Schlumberger Canada Incorporated; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech Inc.; Wabiskaw Explorations Ltd.; Cromarty Petroleum Company Limited; Petroquimica-Dow S.A.; Ulsan Pacific Chemical Corporation; Dow Corning Corporation; Epoxital; First Chemical Factoring S.p.A.; Oronzio de Nora Technologies S.p.A.; Dow Kakoh Kabushiki Kaisha; Dow Mitsubishi Kasei Limited; Anticorrosives Industriales Ltda.; Family Com. e Ind. de Produtos de Limpeza Ltda.; Dow-United Technologies Composite Products Inc.; Dowell Schlumberger Corporation; Dowell Schlumberger Inc.; El Dorado Terminals Company; Gurit-Essex, A.G.; Etoxilados Del Plata S.A.; Joliet Marine Terminal Trust Estate; Marion Merrell Dow Inc.; Gruppo Lepetit S.p.A.; Merrell Dow Funai K.K.; MDP (Holdings) Ltd.; Nordic Laboratories Inc.; Tanabe-Marion Laboratories; Fort Saskatchewan Ethylene Storage Corporation; Oronzio de Nora S.A. (Lugano); Oronzio de Nora Technologies B.V.; Oronzio de Nora Technologies S.p.A.; Pacific Indomas Plastic Indonesia; Pacific Plastics (Thailand) Limited; Promix System; Marion Merrell Dow Inc.; Airco Generon Systems; DowElanco; Eurosemances,

S.A.; DowElanco B.V.; P.T. Pacific Chemicals Indonesia; Pacific Chemicals Berhad; Generon Systems; Generon Systems AG; Scotdril Offshore Company; The Cynara Company; Vorakim Kimya Sanayi Ve Ticaret A.S.; Zip Pak Incorporated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE AFFILIATIONS OF RESPONDENT	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Bendectin	3
B. The District Court Proceedings	4
C. The *Richardson* Decision	5
D. The Decision Below	6
REASONS FOR DENYING THE WRIT	8
I. THIS CASE PRESENTS NO CONFLICT AS TO THE PROPER APPLICATION OF FEDERAL RULE OF EVIDENCE 703 IN ADMITTING OR EXCLUDING EXPERT OPINION TESTIMONY	8
II. THIS CASE DOES NOT PRESENT THE ISSUE OF THE STANDARD FOR APPELLATE REVIEW OF A TRIAL COURT DETERMINATION OF THE ADMISSIBILITY OF AN EXPERT OPINION	12
III. THIS CASE DOES NOT PRESENT THE ISSUE WHETHER AN APPELLATE COURT THAT REVERSES ON THE BASIS OF EVIDENTIARY ERRORS IS LIMITED TO GRANTING A NEW TRIAL	14
IV. THE COURT OF APPEALS ACTED LEGITIMATELY AND IN A MANNER CONSISTENT WITH OTHER COURTS; THERE IS NO REASON TO GRANT CERTIORARI AS AN EXERCISE OF THIS COURT'S SUPERVISORY RESPONSIBILITY	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases — Page

Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, *modified*, 884 F.2d 166, *reh'g denied*, 884 F.2d 167 (5th Cir. 1989) (*en banc*), *cert. denied*, 110 S.Ct. 1511 (1990) 1, 7, 10, 11, 16

Chappell v. GTE Products Corp., 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987) 13

Coleman v. Parkline Corp., 844 F.2d 863 (D.C. Cir. 1988) 13

DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) 9-10

Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) ..... *passim*

EEOC v. FLRA, 476 U.S. 19 (1986) 15

EEOC v. Delaware Dep't of Health & Social Serv., 865 F.2d 1408 (3d Cir. 1989) 13

In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) 9, 10

In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd in part, rev'd in part, and remanded sub nom. In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) 16

International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc., 851 F.2d 540 (1st Cir. 1988) 10

Lynch v. Merrell-National Laboratories, 830 F.2d 1190 (1st Cir. 1987) 7, 10, 16

Mathewson v. National Automatic Tool Co., 807 F.2d 87 (7th Cir. 1986) 13

Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977) 9

Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525 (11th Cir. 1989) 14

Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979) 13

Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987) 13

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) 9
Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) 14
Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502 (2d Cir. 1989) 13
Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir.), *cert. denied*, 110 S. Ct. 218 (1989) ..... *passim*
Salem v. United States Lines Co., 370 U.S. 31 (1962) 13
Smith v. Monsanto Chemical Co., 770 F.2d 719 (8th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986) 13-14
Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985) 13
United States v. Johnston, 268 U.S. 220 (1925) 12

Federal Statutes and Rules

Fed. R. Civ. P. 50(b) 8
Fed. R. Evid. 703 ..... *passim*

Miscellaneous

5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 50.07[2] (2d ed. 1990) 15

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

This is the third time in the past year that this Court has been asked to grant certiorari in a Bendectin case. On the prior two occasions the Court denied the petitions.[1] This case raises no new issues worthy of certiorari. The instant petition, too, should be denied.

Contrary to petitioners' suggestion, this case does not forge new law, much less is it in conflict with other circuits. In its opinion below, the United States Court of Appeals for the District of Columbia Circuit was engaged in the most routine function of a first level appellate court—reviewing the decision of a trial court to ensure its

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[1] *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 110 S. Ct. 1511 (1990); *Richardson v. Richardson-Merrell, Inc.*, 110 S. Ct. 218 (1989).

conformity with precedent. In *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir.), *cert. denied*, 110 S. Ct. 218 (1989), a unanimous panel of the D.C. Circuit affirmed the district court's grant of judgment n.o.v. in an earlier Bendectin case. The court in *Richardson* held that, as a matter of law, no reasonable juror could have found on the evidence presented that Bendectin caused the plaintiff's birth defects. In the case below, another unanimous panel of the D.C. Circuit applied the *Richardson* decision to a later Bendectin case—one tried on virtually identical evidence by the same lawyers who had tried *Richardson*. After carefully reviewing the record and finding no material evidentiary differences between this case and *Richardson*, the court below reached the unremarkable conclusion that the district court had erred when it denied Merrell's motion for judgment n.o.v. *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir. 1990).

Petitioners cast this case as involving important issues concerning the interpretation and application of Federal Rule of Evidence 703. In asserting that there are conflicts among the circuits regarding Rule 703, petitioners cite a series of cases that address the procedural steps to be followed and the standards to be applied by trial judges in making threshold evidentiary rulings on whether to admit or exclude expert opinion testimony. Yet nothing in the opinion below stands in conflict with these cases. The issues petitioners frame as to the mechanics of how Rule 703 operates in the trial setting to admit or exclude evidence and how appellate courts should review such evidentiary rulings are not presented in this case.

The petition obscures the fact that, unlike the cases petitioners claim are in conflict, the case at bar arose on review of a motion for judgment n.o.v. and not on review of an evidentiary ruling excluding certain evidence. Unlike the cases that petitioners would have this Court address, the trial court here did not conduct a Rule 703 threshold inquiry as to the admissibility of petitioners'

expert opinions or make a preliminary determination as to the reliability of the materials on which those opinions were based. Rather, both the trial court and the appellate court on review were engaged in an altogether different exercise—one on which there is no circuit conflict—an examination of petitioners' admitted evidence, including the experts' opinions and their Rule 703 bases, to determine whether it reasonably supported the jury's verdict under traditional judgment n.o.v. standards. In reversing the trial court's denial of respondent's judgment n.o.v. motion, the court below, relying on *Richardson* and reviewing the entire evidentiary record in the case at bar, ruled that there was not sufficient evidence to support the jury's verdict. The court announced no new law governing how Rule 703 should operate in admitting or excluding evidence, and its assessment of the evidence under judgment n.o.v. criteria in no sense conflicted with decisions of other circuits.

STATEMENT OF THE CASE

A. Bendectin

For more than twenty-five years (1957-1983), Bendectin was the treatment of choice for women who suffered nausea and vomiting in early pregnancy. As one of the most widely-prescribed drugs in early pregnancy, Bendectin attracted enormous scrutiny to determine whether it could cause birth defects in a developing fetus. In the early 1960's, Merrell began a multi-year series of experimental studies on laboratory animals, testing for fetal malformations. The scientists conducting these studies concluded that the data showed that neither Bendectin nor its individual components increased the incidence of fetal abnormalities even in doses up to 90 times the maximum equivalent human dose.

In addition to animal studies, Merrell scientists and other researchers outside the company sought direct evidence of whether Bendectin causes any adverse effects in

humans by conducting epidemiological studies. These human studies examined the rates of birth malfunctions in populations exposed to Bendectin compared to non-exposed populations. Beginning with Merrell's own study (Bunde & Bowles) published in 1963 and as recently as a National Institutes of Health study (Shiono & Klebanoff) published in 1989, epidemiologists of international renown have conducted more than thirty population studies on Bendectin. It is uncontroverted that not a single published study and not a single scientific journal article, text, or reference work has concluded that Bendectin causes human birth defects.

Both the human epidemiological studies and the animal experiments were thoroughly evaluated by the Food & Drug Administration (FDA). In September 1980, the FDA's Fertility and Maternal Health Drugs Advisory Committee, assisted by expert consultants, exhaustively reviewed the medical literature and then heard thirty witnesses in a public hearing, including many of the authors of the relevant literature as well as several testifying experts for plaintiffs. The Advisory Committee concluded that the available scientific data did not demonstrate that Bendectin is associated with an increased risk of birth defects. The FDA adopted the Committee findings and has adhered to its conclusions to this day.

B. The District Court Proceedings

This case was brought by Robert and Sandra Ealy claiming that, because Mrs. Ealy used Bendectin during her pregnancy, their minor son Sekou Ealy was born with limb defects. At trial, petitioners attempted to meet their burden of proving that Bendectin caused Sekou's malformations by expert opinion evidence that relied on inferences from analysis of Bendectin's chemical composition, *in vitro* studies of the effects of Bendectin components on animal cells in test tube cultures, *in vivo* data from studies conducted on animals

given Bendectin, and unpublished criticisms and reinterpretations of epidemiological studies of Bendectin.

Based on this evidence, the jury reached a verdict for petitioners, awarding $20 million in compensatory damages and $75 million in punitive damages. The district court rejected Merrell's argument, on motion for judgment n.o.v., that the verdict was without foundation. The district court upheld the compensatory damages award, finding that the $20 million figure did not "shock the conscience" of the court. The district court set aside the punitive damages award because there was no evidence of willful disregard or outrageous conduct by Merrell.

C. The *Richardson* Decision

Subsequent to the district court's denial of Merrell's motion for judgment n.o.v. in this case, the D.C. Circuit issued its decision in another Bendectin case, *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir.), *cert. denied*, 110 S. Ct. 218 (1989). After an exhaustive review of the record, the *Richardson* court affirmed the trial court's order granting Merrell judgment n.o.v. on grounds that there was no genuine scientific foundation sufficient to support a verdict for plaintiffs. The court held that the question of whether Bendectin causes birth defects did not present a classic "battle of the experts" concerning an issue at the "frontier" of medical science. The court noted that Bendectin has been studied extensively and a wealth of published, peer-reviewed, epidemiological data has been amassed, none of it supporting the proposition that Bendectin is a human teratogen. *Richardson*, 857 F.2d at 832.

On the record as developed in *Richardson*, the court ruled, the "twenty years of scientific study" and the resulting "published literature, must be given their just due." The contrary opinions announced by plaintiffs' experts in *Richardson* that Bendectin causes birth defects

were without adequate foundation and, as a matter of law, could not support a verdict. *Id.* at 829.

The *Richardson* plaintiffs moved the D.C. Circuit for reconsideration and suggested rehearing *en banc*; both the motion and the suggestion were denied without dissenting vote. Arguing many of the points raised by petitioners here, the *Richardson* plaintiffs then petitioned this Court for certiorari. The Court denied the petition.

D. The Decision Below

While the *Richardson* case was pending in the D.C. Circuit, Merrell appealed the decision of the district court in the instant case denying its motion for judgment n.o.v. The Court of Appeals initially stayed consideration of the *Ealy* appeal pending its decision of *Richardson.* When *Richardson* was decided, Merrell asked the court to reverse the *Ealy* judgment in light of *Richardson.* The suggestion that Merrell sought only a new trial and that the court acted *sua sponte* when it remanded the case for entry of judgment n.o.v. (Petition at 14) is without basis in the record.[2]

The court below reviewed the trial court's judgment n.o.v. decision in a conventional and unremarkable manner. First, the court discussed its decision in *Richardson.* 897 F.2d at 1161. Next, the court articulated the standard for reviewing the district court's decision on a motion for judgment n.o.v., applying the unchallenged rule that review of such a decision is *de novo* because the appellate court has to ask itself the same question as the district court—"whether, viewing the evidence in the light most favorable to the plaintiff, and giving him every

[2] It is clear from the Court of Appeals' opinion that Merrell sought reversal of the judgment, not simply a new trial. 897 F.2d at 1159-60. Merrell's separate request for a new trial was limited to the excessiveness of the award and the trial court's handling of certain evidentiary issues which the Court of Appeals found unnecessary to address.

reasonable inference, the evidence is so one-sided that no reasonable juror could find on the admissible evidence" in his favor. *Id.*

Having articulated the correct standard and having recognized that *Richardson* was relevant to the application of the standard in a later case alleging that Bendectin causes birth defects, the court applied its decision in *Richardson.* The court looked to *Richardson* both to examine its legal holding and to review the evidentiary record in that case. *Ealy,* 897 F.2d at 1161-62. The court also looked outside its circuit and found that two other circuits, the First[3] and Fifth,[4] reviewing simliar records, had concluded that Bendectin has not been shown to cause birth defects. 897 F.2d at 1162.

Finally, in a step which the petition repeatedly ignores, the court reviewed the record evidence in this case and compared it to that in *Richardson.* The court noted that the admitted expert testimony and the underlying Rule 703 bases for that testimony were almost identical to those in *Richardson.*[5] It then examined the specific evidence in this case which petitioners claimed differed from that in *Richardson* and found that none of the proferred differences were material. *Ealy,* 897 F.2d at 1162.

Having concluded that the record here was materially the same as that in *Richardson,* and confronted with the holding in *Richardson* that no reasonable juror could find on such a record that Bendectin causes birth defects, the

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[3] *See Lynch v. Merrell-National Laboratories,* 830 F.2d 1190 (1st Cir. 1987).

[4] *See Brock v. Merrell Dow Pharmaceuticals, Inc.,* 874 F.2d 307, *modified,* 884 F.2d 166, *reh'g denied,* 884 F.2d 167 (5th Cir. 1989) (*en banc*), *cert. denied,* 110 S. Ct. 1511 (1990).

[5] In fact, with one exception, the petitioners' experts were the same as those who testified for the plaintiffs in *Richardson* and they based their opinions largely upon the same studies that they relied upon there. *Ealy,* 897 F.2d at 1160, 1162-63.

court below concluded that it was error for the district court to deny Merrell's motion for judgment n.o.v. As in *Richardson*, petitioners here sought reconsideration both by the panel and the *en banc* court. The requests again were denied without dissenting vote.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO CONFLICT AS TO THE PROPER APPLICATION OF FEDERAL RULE OF EVIDENCE 703 IN ADMITTING OR EXCLUDING EXPERT OPINION TESTIMONY.

This petition, like the petition in *Richardson* which the Court earlier denied, attempts to find a conflict where none exists. Both *Richardson* and *Ealy* stand for the proposition that the federal courts are empowered on a motion for judgment n.o.v. to review whether an expert's opinion, and any Rule 703 material on which it rests, have a sufficient basis to support a jury's verdict. *Ealy*, 897 F.2d at 1160; *Richardson*, 857 F.2d at 833. No other circuit has reached a contrary conclusion.

The purported conflict among the circuits which petitioners construct (Petition at 15-18) concerns the application of Rule 703 requirements, not on review of a decision granting or denying judgment n.o.v., but as a threshold determination of whether to admit or exclude a particular expert opinion. But the controlling issue before the court below was whether the district court erred when it denied Merrell's motion under Federal Rule of Civil Procedure 50(b) for judgment n.o.v. (897 F.2d at 1161), not whether the expert opinions on causation were properly admitted, as a threshold matter, under Rule 703. What the court below held, after applying its decision in *Richardson* to the nearly identical record here, was that the expert opinions, in light of the complete trial record, were so lacking in scientific support and so contradicted by the overwhelming scientific evidence that Bendectin is not a teratogen that they could not sustain petitioners'

burden of establishing causation. Once it found no material differences between these expert opinions and their bases and those which the *Richardson* court had found lacking, the court was bound to follow *Richardson* and hold that Merrell's motion for judgment n.o.v. should have been granted.

The decisions cited by petitioners from other circuits are not in conflict with the *Richardson* and *Ealy* analysis. Thus, the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), held that, if an expert's opinion is challenged on evidentiary grounds, the trial court must make an initial factual determination whether the specific requirements of Rule 703 are satisfied. 723 F.2d at 276-77. While the Third Circuit ruled that, on the facts of that case, the expert's opinion had an adequate foundation, it announced no rule in conflict with *Richardson* or *Ealy* that the court is powerless to grant judgment n.o.v. solely because an expert's opinion passes threshold muster under Rule 703.[6]

The Third Circuit's recent decision, *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990), a Bendectin case, demonstrates the absence of any true

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[6] Indeed, the Third Circuit's earlier opinion in *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985), which arose in the summary judgment setting, quoted the D.C. Circuit's opinion in *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977), with approval:

> To hold that Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than . . . theoretical speculations would seriously undermine the policies of Rule 56. We are unwilling to impose the fruitless expenses of litigation that would result from such a limitation on the power of a court to grant summary judgment.

745 F.2d at 262.

conflict between cases like *In re Japanese Electronic Products*, dealing with threshold Rule 703 rulings, and *Richardson* or *Ealy*, dealing with judgment n.o.v. The district court in *DeLuca* granted summary judgment when it excluded, on Rule 703 grounds, the opinion of plaintiffs' expert. The Third Circuit reversed and criticized the district court for excluding the opinion solely on the basis of *Richardson* and *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987), finding that the trial court failed to conduct a factual inquiry into the basis of the *DeLuca* expert's opinion and failed to compare the *DeLuca* record to those in *Richardson* and *Lynch*. The Third Circuit outlined the steps the trial court should take to conduct a threshold Rule 703 analysis. The court made clear, however, that on remand the district court was free to grant summary judgment in favor of Merrell, even if the opinion was deemed admissible, if the court found the opinion insufficient to support a rational finding that plaintiffs had met their burden of proving causation.

Nor have the other circuits foreclosed review of expert opinions and their Rule 703 bases on motions for summary judgment or judgment n.o.v. Petitioners suggest a conflict with the First Circuit, for example, based on *International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540 (1st Cir. 1988), which discusses the standards under Rule 703 for excluding expert testimony and holds on the facts of that case that the testimony should have been admitted. But petitioners all but ignore the First Circuit's decision in *Lynch*, where the court in another Bendectin case ruled that the plaintiff's evidence could not survive a motion for summary judgment. In the same fashion, petitioners cite several cases from the Fifth Circuit, again dealing with the appropriate threshold procedures under Rule 703 for admission or exclusion of evidence, but consign to a footnote (Petition at 21 n.24) any reference to *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, *modified*,

884 F.2d 166, *reh'g denied*, 884 F.2d 167 (5th Cir. 1989) (*en banc*), *cert. denied*, 110 S. Ct. 1511 (1990), which, like *Richardson* and *Ealy*, concluded on motion for judgment n.o.v. that the record evidence did not support a verdict that Bendectin causes birth defects.[7]

Because the court below was deciding whether judgment n.o.v. was appropriate, and not reviewing a threshold decision by the trial court excluding certain evidence, there was no occasion for the opinion below to discuss how Rule 703 should be interpreted and applied in the evidentiary setting. To be sure, both in *Richardson* and here, the court discussed Rule 703 and the scientific underpinnings of petitioners' expert evidence. There is an interplay between assessing evidence at the threshold under Rule 703 and assessing at the close of the case, on motion for judgment n.o.v., whether such evidence supports a verdict. With Rule 703 as its guide, the *Richardson* court exposed the fact that the naked opinions on causation were divorced from and contradicted by the wealth of scientific data pertaining to Bendectin.

In sum, while the court below discussed Rule 703 in analyzing whether the opinions announced by petitioners' experts had genuine scientific support, the court did not create a new standard, in conflict with other circuits, for evaluating the reliability of the materials upon which expert opinions are based. Instead, the court conducted a review of the entire record, applied established law, and held that the opinions announced by petitioners' experts and the foundation underlying those opinions did not support the jury's verdict. The procedural steps for applying Rule 703, the standards for the reliability of data on which an expert can base an opinion, and the criteria for excluding such an opinion were not argued

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[7] Every case cited by petitioners turned on the threshold decision to admit or exclude evidence. Petition at 15-18 & nn.9-20. None considered the issue on a complete record in the judgment n.o.v. setting.

by the parties below, were not reviewed or decided by the Court of Appeals, and are not properly presented here.

The court below decided none of the issues which petitioners assert are in conflict. Whether seen as ruling that petitioners' expert opinions, in light of all the evidence, so lacked foundation as to be excludable under Rule 703, or viewed as holding that, even if admissible at the evidentiary threshold, the opinions ultimately lacked scientific basis, the result is the same—a decision under traditional judgment n.o.v. criteria that petitioners' evidence did not support the verdict. The only conceivable role for this Court in reviewing that decision would be to examine the lengthy trial record to see if it can find what the Court of Appeals did not—a factual basis for petitioners' expert testimony. This Court has ruled that such a factual canvassing is not a task to be served by certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Certiorari should be denied.

II. THIS CASE DOES NOT PRESENT THE ISSUE OF THE STANDARD FOR APPELLATE REVIEW OF A TRIAL COURT DETERMINATION OF THE ADMISSIBILITY OF AN EXPERT OPINION.

Petitioners assert that certiorari should be granted to resolve a conflict between the decision below and the opinions of this Court, and others, over the appropriate standard for appellate review of a decision to admit an expert opinion. According to the petition, by conducting a *de novo* review of the district court's decision to admit expert opinion evidence, the court below ignored precedent that requires deference to the trial court. Again, the petition mischaracterizes the Court of Appeals' opinion. The issue framed by the petition is not presented here, and the asserted conflict is illusory.

Because the question before it was the propriety of the district court's decision on the motion for judgment n.o.v., the court below never even purported to conduct *de novo* review of the trial court's decision on the admissibility of expert opinions under Rule 703. Indeed, the trial court never made a threshold Rule 703 decision as to the reliability of materials upon which petitioners' experts based their opinions. Given that the trial court made no Rule 703 decision, the Court of Appeals had no occasion to review any such decision, much less to defer to it. When the D.C. Circuit is called upon to review the decisions of trial courts to admit or exclude expert opinion, it follows the appropriate standard as set out in *Salem v. United States Lines Co.*, 370 U.S. 31 (1962).[8]

It was in reviewing the trial court decision denying Merrell's motion for judgment n.o.v. that the circuit court applied the *de novo* standard. "The standard of review of the trial court's decisions on motions for judgment n.o.v. is *de novo*." 897 F.2d at 1161. Petitioners do not, and cannot, argue that the court erred in utilizing the *de novo* standard to review the decision on the motion for judgment n.o.v.[9]

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[8] *See, e.g., Morgan v. District of Columbia*, 824 F.2d 1049, 1061 (D.C. Cir. 1987) ("a trial judge has broad discretion in determining when expert testimony is necessary to aid the jury in its search for the truth . . . we must sustain his decision to permit the jury to decide the case without the aid of experts unless the decision was 'manifestly erroneous.' *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962)."). *See also Coleman v. Parkline Corp.*, 844 F.2d 863, 865-66 (D.C. Cir. 1988).

[9] *See, e.g., Morgan v. District of Columbia*, 824 F.2d at 1056; *Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 508 (2d Cir. 1989); *EEOC v. Delaware Dep't of Health & Social Serv.*, 865 F.2d 1408, 1413 (3d Cir. 1989); *Miller v. Premier Corp.*, 608 F.2d 973, 981 n.8 (4th Cir. 1979); *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 94 (5th Cir. 1985); *Chappell v. GTE Prod. Corp.*, 803 F.2d 261, 265 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *Matthewson v. National Automatic Tool Co.*, 807 F.2d 87, 90 (7th Cir. 1986); *Smith v. Monsanto Chem. Co.*, 770

III. THIS CASE DOES NOT PRESENT THE ISSUE WHETHER AN APPELLATE COURT THAT REVERSES ON THE BASIS OF EVIDENTIARY ERRORS IS LIMITED TO GRANTING A NEW TRIAL.

The third question petitioners suggest can be resolved by granting certiorari is whether an appellate court that reverses on the basis of an error in admitting evidence is limited in the relief that it can award to ordering a new trial. Once again, petitioners are asking this Court to resolve an issue not presented by this case.

Petitioners' argument that this case presents the issue of what an appellate court can do when it reverses on evidentiary grounds is based upon their persistent refusal to acknowledge what the court below actually did. By characterizing the opinion below as holding only that particular expert opinions were inadmissible, petitioners again ignore the fact the Court of Appeals was reviewing the entire evidentiary record in assessing the trial court's decision on Merrell's motion for judgment n.o.v. and not its rulings on the admissibility of particular evidence. After conducting that review, the court concluded that the trial court erred when it denied the motion because no reasonable juror could find, on the evidence presented, that Bendectin caused Sekou Ealy's birth defects. Once it reached this conclusion, there was nothing to send back for trial and the court acted properly in directing that a judgment in Merrell's favor be entered.[10]

F.2d 719, 722 (8th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 122 (1986); *Miles v. Tennessee River Pulp & Paper Co.*, 862 F.2d 1525, 1528 (11th Cir. 1989). *See also*, 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.07[2] (2d ed. 1990).

[10] The suggestion that petitioners were prejudiced because of their reliance on the trial court's decision to admit their proffered expert testimony and that they would have offered other evidence had they known of the Court of Appeals' position (Petition at 24) is at best disingenuous. Nowhere in the petition or in any submis-

Moreover, this Court should not grant certiorari to consider this issue because it was never raised below. Faced with Merrell's specific request that the court reverse the district court's denial of its motion for judgment n.o.v. on the basis of *Richardson*, petitioners never argued that such a reversal could only result in the case being sent back for a new trial. Similarly, in their petition for rehearing and suggestion of rehearing *en banc*, petitioners again failed to argue that the panel erred because it directed entry of judgment for Merrell rather than sending the case back for a new trial. Having failed to raise this issue on two separate occasions, thereby depriving the appellate court of an opportunity even to address it, petitioners should not now be heard to complain of the nature of the relief granted.[11]

IV. THE COURT OF APPEALS ACTED LEGITIMATELY AND IN A MANNER CONSISTENT WITH OTHER COURTS; THERE IS NO REASON TO GRANT CERTIORARI AS AN EXERCISE OF THIS COURT'S SUPERVISORY RESPONSIBILITY.

Petitioners' argument that the court below disregarded this Court's precedents, casually placed itself in conflict with other federal circuits, and assigned itself the "institutionally peculiar role" of interpreting the Federal Rules of Evidence without regard to the intent of Congress in establishing those rules (Petition at 25) is simply not supported by a review of the court's opinion.

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sion to the court below have petitioners even attempted to show what this additional evidence might be. Moreover, petitioners were represented at trial by the same attorneys who represented plaintiffs in *Richardson*. Those attorneys had seen the district court in *Richardson* declare that the very evidence they were offering in *Ealy* was insufficient, as a matter of law, to sustain the burden of proving causation. There can be no genuine claim of surprise when evidence once held legally insufficient is so held again.

[11] *See, e.g., EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals.").

The court below was not articulating new rules for the admissibility of expert opinion under Rule 703, engaging in *de novo* review of trial court decisions on the admissibility of evidence, or directing entry of judgment merely on the basis of reversal of evidentiary rulings. Rather, the court was reviewing, under a well-established standard, the district court's decision on the motion for judgment n.o.v. to insure its conformity with circuit precedent.

Petitioners' charges that the court forged new law are further belied by the consistency of the opinion below with that of other courts which have considered the question, on fully developed records, of whether Bendectin causes birth defects. At the time the court below rendered its decision reversing the district court's denial of Merrell's motion for judgment n.o.v., three Courts of Appeals had held that there was insufficient evidence upon which to conclude that Bendectin caused human birth defects,[12] a conclusion also reached by the jury which decided the causation issue in the multidistrict action involving more than 1,000 plaintiffs.[13] Indeed, the panel that decided *Richardson* had carefully reviewed a nearly identical record in concluding that as a matter of law the record did not support a finding that Bendectin causes birth defects.

These decisions were grounded in more than twenty years of uncontradicted, published and peer-reviewed research that also formed the record of this case. Faced with such an overwhelming record, the court below behaved legitimately and appropriately when it concluded that, because there were no material factual differences distinguishing the record in this case, it was also bound

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[12] *Richardson; Brock; Lynch.*

[13] *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212 (S.D. Ohio 1985) (M.D.L. No. 486), *aff'd in part, rev'd in part, and remanded sub nom. In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

to find that no reasonable juror could conclude that Bendectin caused Sekou Ealy's birth defects.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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